IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REGENT NATIONAL BANK,	:	CIVIL ACTION
Plaintiff,	:	
v.	:	No. 96-8615
K-C INSURANCE PREMIUM FINANCE CO., et al.,	:	
Defendants.	:	

MEMORANDUM

R.F. KELLY, J. NOVEMBER , 1997

Before this Court is Plaintiff's Motion to Dismiss Counts IV, V, and VI of Defendants' Answer, Affirmative Defenses, and Amended Counterclaim pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons that follow, Plaintiff's Motion will be granted in part and denied in part.

Background

The claims in this case arose from conduct surrounding a Processing, Servicing, Marketing, and Consulting Agreement and from a Promissory Note and Business Loan Agreement ("Loan Documents"). Plaintiff Regent National Bank ("Regent") originally brought this action against Defendants K-C Insurance Premium Finance Co. ("KC"), Alvin Chanin, Antimo Cesaro ("Mr. Cesaro"), Myra Chanin, and Kimberly Cesaro ("Mrs. Cesaro"). Subsequently, separate actions were filed against Regent by Mrs. Cesaro, by Alvin Chanin and KC, and by Mr. Cesaro. By

stipulation, the parties agreed to consolidate these actions in the present litigation as Counts IV, V, and VI, respectively, of Defendants' Counterclaim.

In Count IV, Mrs. Cesaro alleges that on April 12, 1996, at the behest of Regent, her husband, Mr. Cesaro, presented her with signature pages from the Loan Documents. She further alleges that Regent required her to execute the Loan Documents as a condition to making a loan to certain third parties, including her husband. Mrs. Cesaro maintains that as a result, Regent violated the Equal Credit Opportunity Act ("ECOA"), intentionally inflicted emotional distress, interfered with prospective business relations, and caused her credit to be slandered.

In Count V, KC and its controlling officer, president, and sole shareholder, Alvin Chanin, allege that Regent employed some of KC's former employees, but issued payroll checks reflecting that the payor and employer was KC. KC and Alvin Chanin allege that in so doing, Regent committed fraud. KC also alleges claims for conversion and tortious appropriation of name.

Count VI contains an action originally filed by Mr. Cesaro alleging that Regent falsely held out to others that Mr. Cesaro was President of Regent, and further that Regent affixed his signature to documents and payroll checks. As a result, Mr. Cesaro brings claims for false light, fraud, tortious appropriation of name, and conversion.

Standard

A motion to dismiss, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, tests the legal sufficiency of the complaint. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). A court must determine whether the party making the claim would be entitled to relief under any set of facts that could be established in support of his or her claim. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Wisniewski v. Johns-Manvillle Corp., 759 F.2d 271, 273 (3d Cir. 1985). In considering a motion to dismiss, all allegations in the complaint and all reasonable inferences that can be drawn therefrom must be accepted as true and viewed in the light most favorable to the non-moving party. See Rocks v. City of Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989). Dismissal is appropriate only when it clearly appears that the plaintiff has alleged no set of facts which, if proved, would entitle him or her to relief. Conley, 355 U.S. 41, 45-46 (1957); Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990).

Discussion

Mrs. Cesaro alleges that she suffered severe emotional distress as a result of Regent's conduct in obtaining her signature on the Loan Documents. Under Pennsylvania law, a claim for intentional infliction of emotional distress must be premised on conduct that is "so outrageous in character, and so extreme in

degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." Cox v. Keystone Carbon Co., 861 F.2d 390, 395 (3d Cir. 1988) (quoting Buczek v. First Nat'l Bank of Mifflintown, 531 A.2d 1122, 1125 (Pa. Super. 1987)). It is for the court to determine if the conduct is so extreme as to permit recovery. Cox, 861 F.2d at 395.

The conduct of Regent does not rise to the level of outrageousness required to recover for intentional infliction of emotional distress. Plaintiff only alleges that Mrs. Cesaro signed the Loan Documents at Regent's behest, and that Regent was aware that she had not read the documents in their entirety. This conduct is not "beyond all possible bounds of decency." Therefore, Mrs. Cesaro's claim for emotional distress must be dismissed.

Mrs. Cesaro also brings a counterclaim for interference with prospective business relations. Under Pennsylvania law, there are four elements to a cause of action for intentional interference with prospective contractual relations: (1) a prospective contractual relation (2) the purpose or intent to harm the claimant by preventing the relation from occurring, (3) the absence of privilege or justification on the part of the defendant, and (4) the occasioning of actual damage resulting from the conduct. Thompson Coal Co. v. Pike Coal Co., 412 A.2d

466, 471 (Pa. 1979). A prospective contractual relation is "something less than a contractual right, something more than a mere hope." Id. There must be a "reasonable likelihood or probability" of a contract. Tose v. First Pennsylvania Bank, N.A., 648 F.2d 879, 898 (3d Cir. 1981), cert. denied, 454 U.S. 893 (1981).

In her counterclaim, Mrs. Cesaro alleges that Regent's actions limited, reduced, and prejudiced her "ability to enter into business transactions including a loan and/or refinancing transactions with third parties." She does not allege the existence of any specific prospective contracts, much less the reasonable probability that she would have entered into contracts. The mere possibility that she may wish to obtain a loan at some future time is insufficient to state a claim for interference with prospective contractual relations.

Mrs. Cesaro also asserts a counterclaim for slander of credit. Slander of credit requires "the publication, or communication to a third person, of false statements concerning the plaintiff, his property, or his business." F.D.I.C. v. Bathgate, 27 F.3d 850, 871 (3d Cir. 1994). In her counterclaim, the only communication or publication concerning Mrs. Cesaro's alleged obligations to Regent mentioned is the original Complaint

filed by Regent.[1] This communication cannot be the basis for a slander of credit action because allegations made in pleadings filed in an action are privileged as long as they have some relation to the action. Id.

In Count V, KC asserts a cause of action for conversion of its name, good will, and reputation. Similarly, in Count VI, Mr. Cesaro asserts a counterclaim for conversion of his name.[2] Pennsylvania courts have defined conversion as "the deprivation of another's right of property in, or use or possession of, a chattel, or other interference therewith, without the owner's consent and without lawful justification." Bank of Landisburg v. Burruss, 524 A.2d 896, 898 (Pa. Super. 1987), appeal denied, 532 A.2d 436 (Pa. 1987) (quoting Stevenson v. Economy Bank of Ambridge, 197 A.2d 721, 726 (Pa. 1964)). Mr. Cesaro argues that in Pennsylvania, conversion is not limited to chattels, but rather includes intangibles such as good will, name, and reputation. This conclusion is based primarily upon a statement by the Third Circuit that "common law conversion in Pennsylvania

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[1]In its Memorandum of Law in support of this Motion, Regent also states that it corresponded with Kimberly regarding a default and demand for payment. Taking this statement to be true, Kimberly still cannot maintain an action for slander of credit because the alleged information was not communicated to a third party.

[2]Although Mr. Cesaro does not offer any specific allegations for his conversion claim, because his complaint deals with the alleged use by Regent of his signature, it is assumed that his action is for conversion of his name.

may be somewhat broader in scope." Universal Premium Acceptance Corp. v. York Bank & Trust Co., 69 F.3d 695, 704 (3d Cir. 1995) (citing D & G Equipment Co. v. First Nat'l Bank of Greencastle, 764 F.2d 950, 957 (3d Cir. 1985)). Reliance on this statement can only be explained by the fact that not only did Mr. Cesaro's attorney fail to read the entire Universal Premium case, he neglected even to read the paragraph immediately preceding the quotation upon which he relies. Both Universal Premium and D & G dealt with the conversion of commercial paper. The statement quoted above was in reference to the fact that common law conversion in Pennsylvania is broader in scope than Pennsylvania's statute relating to conversion of commercial paper. See Universal Premium, 69 F.3d at 704; D & G, 764 F.2d at 957 n.4. Thus, these cases are irrelevant to the present case.

Pennsylvania courts have recognized that some forms of property which were beyond the common law definition are capable of being converted. See Northcraft v. Edward C. Michener Assocs., 466 A.2d 620, 624-25 (Pa. Super. 1983). This expansion of conversion has been limited to "the kind of intangible rights which are customarily merged in, or identified with some document." Id. (quoting William L. Prosser, Torts § 15 (4th ed. 1971)). The intangible rights at issue here -- name, good will, and reputation -- are neither merged in nor identified with any documents. No case in Pennsylvania (or any other jurisdiction)

has expanded conversion to the extent that would allow recovery for the claims alleged by Mr. Cesaro.[3]

Conclusion

In summary, the actions alleged by Mrs. Cesaro are not extreme and outrageous so as to allow recovery for intentional infliction of emotional distress. Further, the facts she alleges are not sufficient to allow recovery for interference with prospective business relations or slander of credit. Accordingly, Count IV will be dismissed to the extent that it alleges these claims. Pennsylvania has not expanded conversion to allow recovery for name, good will, and reputation. Therefore, Counts V and VI will be dismissed to the extent that they allege claims for conversion.

An appropriate Order follows.

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[3]It should be noted that Florida stands alone as a jurisdiction that may recognize an action for conversion of the good will of a business. See In Re Estate of Corbin, 391 So.2d 731 (Fla. App. 1980). But such a claim has been rejected by all other courts addressing this issue. This Court was unable to locate any other cases permitting such a claim. Further, this Court could find no case in any jurisdiction in the United States permitting recovery for conversion of name or reputation. For a general discussion of the conversion of intangibles, see Val D. Ricks, The Conversion of Intangible Property: Bursting the Ancient Trover with New Wine, 1991 B.Y.U.L. Rev. 1681 (1991).

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ORDER

AND NOW, this day of November, 1997, upon consideration of Plaintiff's Motion to dismiss Counts IV, V, and VI of Defendants' Answer, Affirmative Defenses, and Amended Counterclaim, and all responses thereto, it is hereby ORDERED that:

1. Plaintiff's Motion is GRANTED in part and DENIED in part;

2. Count IV is dismissed with prejudice to the extent that it alleges claims for emotional distress, slander of credit, and interference with prospective business relations;

3. Counts V and VI are dismissed with prejudice to the extent that they allege claims for conversion.

BY THE COURT:

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Robert F. Kelly, J.